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IN THE
Supreme Court of the United States

BANK OF AMERICA CORPORATION, *et al.*, *Petitioners*,
v.
CITY OF MIAMI, FLORIDA, *Respondent*.

WELLS FARGO & CO., *et al.*, *Petitioners*,
v.
CITY OF MIAMI, FLORIDA, *Respondent*.

On Petitions for Writs Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF THE AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CONSUMER MORTGAGE COALITION, CREDIT UNION NATIONAL ASSOCIATION, HOUSING POLICY COUNCIL OF THE FINANCIAL SERVICES ROUNDTABLE, INDEPENDENT COMMUNITY BANKERS OF AMERICA, MORTGAGE BANKERS ASSOCIATION, AND NATIONAL ASSOCIATION OF FEDERAL CREDIT UNIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. The Court of Appeals' Decision Subjects Lenders To A Wave Of Costly Litigation With No Reasonable Limiting Principle 7

II. Broad Municipal Standing Under The FHA Is Unwarranted In An Era Of Aggressive Federal Enforcement 12

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases

City of Los Angeles v. Bank of America Corp.,
2014 WL 2770083 (C.D. Cal. June 12, 2014) 8

City of Los Angeles v. Citigroup Inc.,
24 F. Supp. 3d 940 (C.D. Cal. 2014) 8

City of Los Angeles v. JP Morgan Chase & Co.,
No. 2:2014-cv-04168 (C.D. Cal., filed on May 30, 2014) 8

City of Los Angeles v. Wells Fargo & Co.,
2015 WL 4398858 (C.D. Cal. July 17, 2015) 12

City of Los Angeles v. Wells Fargo & Co.,
22 F. Supp. 3d 1047 (C.D. Cal. 2014) 8

City of Memphis v. Wells Fargo Bank, N.A.,
2011 WL 1706756 (W.D. Tenn. May 4, 2011) 8

City of Miami Gardens v. Bank of America Corp.,
No. 1:14-22202 (S.D. Fla., filed on June 13, 2014) 8

City of Miami Gardens v. Citigroup, Inc.,
No. 1:14-22204 (S.D. Fla., filed on June 13, 2014) 8

City of Miami Gardens v. JPMorgan Chase & Co.,
No. 1:14-22206 (S.D. Fla., filed on June 13, 2014) 8

City of Miami Gardens v. Wells Fargo & Co.,
No. 1:14-22203 (S.D. Fla., filed on June 13, 2014) 8

City of Oakland v. Wells Fargo & Co.,
No. 3:15-cv-04321 (N.D. Cal., filed on Sept. 21, 2015) 8, 9

City of Providence v. Santander Bank, N.A.,
No. 1:14-cv-00244 (D.R.I., filed on May 29, 2014) 8

County of Cook v. Bank of America Corp.,
2015 WL 1303313 (N.D. Ill. Mar. 19, 2015) 8

County of Cook v. HSBC N. Am. Holdings Inc.,
2015 WL 5768575 (N.D. Ill. Sept. 30, 2015) 8

County of Cook v. Wells Fargo & Co.,
115 F. Supp. 3d 909 (N.D. Ill. 2015) 8

Davis v. Coca-Cola Bottling Co. Consol.,
516 F.3d 955 (11th Cir. 2008) 15

Dekalb County v. Bank of America Corp.,
No. 1:12-03640 (N.D. Ga., filed on Oct. 18, 2012) 8

Dekalb County v. HSBC N. Am. Holdings, Inc.,
2013 WL 7874104 (N.D. Ga. Sept. 25, 2013) 8

Gladstone, Realtors v. Village of Bellwood,
441 U.S. 91 (1979) 10

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 10

Heckler v. Chaney,
470 U.S. 821 (1985) 15

Mayor and City Council of Baltimore v. Wells Fargo Bank, N.A.,
2011 WL 1557759 (D. Md. Apr. 22, 2011) 8

Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.,
135 S. Ct. 2507 (2015) 10, 14

Thompson v. N. Am. Stainless, LP,
562 U.S. 170 (2011) 10

Trafficante v. Metro. Life Ins. Co.,
409 U.S. 205 (1972) 10, 12, 13, 14

United States v. Countrywide Fin. Corp.,
Consent Order, No. 2:11-cv-10540 (C.D. Cal. Dec. 28, 2011) 4

United States v. Wells Fargo Bank, N.A.,
Consent Order, No. 1:12-cv-01150 (D.D.C. July 12, 2012) 4

Statutes

42 U.S.C. § 3614 ..... 13, 15

Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (Sept. 13, 1988) 13

Other Authorities

Brian Collins, DOJ, CFPB Officials Warn More 'Redlining' Cases on Way, National Mortgage News, Sept. 3, 2015, http://tinyurl.com/NMNRedlining 14

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Saikrishna Prakash, *The Chief Prosecutor*, 73 Geo. Wash. L. Rev. 521, 583 (2005) 15

Press Release, City Attorney's Office, City of Oakland files federal lawsuit against Wells Fargo for damages caused by predatory lending (Sept. 22, 2015), http://tinyurl.com/OaklandLendSuit 9

Press Release, Department of Justice, Justice Department Reaches $335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation (Dec. 21, 2011), http://tinyurl.com/DOJCtywideSettle; 14

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INTEREST OF AMICI CURIAE[1]

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its million employees. ABA members are located in each of the fifty States and the District of Columbia, and include financial institutions of all sizes and types, both large and small. ABA frequently submits *amicus curiae* briefs in state and federal courts in matters that significantly affect its members and the business of banking.

Founded in 1916, the American Financial Services Association ("AFSA") is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

The Consumer Bankers Association ("CBA") is the only national financial trade group focused exclusively on retail banking and personal financial

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), letters from all parties consenting to the filing of this brief have been submitted to the Clerk.

services – banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

The Consumer Mortgage Coalition ("CMC") is a trade association of national mortgage lenders, servicers, and service providers.

The Credit Union National Association ("CUNA") is the largest organization representing the nation's 6,300 credit unions and their more than 100 million members. Credit unions are member-owned financial cooperatives with the statutory mission of meeting the credit and savings needs of their members, often in low-income, rural or underserved populations.

The Housing Policy Council ("HPC") is a division of the Financial Services Roundtable. The Housing Policy Council's members are thirty-three of the Nation's leading mortgage lenders, mortgage servicers and mortgage insurance companies. HPC is a trade association which represents its member companies' interests in federal legislative, regulatory and judicial forums. The Housing Policy Council supports balanced mortgage regulations and lending standards that enable mortgage credit to be made available to all qualified borrowers.

The Independent Community Bankers of America ("ICBA"), a national trade association, is the

nation's voice for more than 6,000 community banks of all sizes and charter types. ICBA member community banks seek to improve cities and towns by using local dollars to help families purchase homes and are actively engaged in residential mortgage lending in the communities they serve.

The Mortgage Bankers Association ("MBA") is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage lending field.

The National Association of Federal Credit Unions ("NAFCU") is a direct membership organization that independently and strongly represents the interests of all federally-insured credit unions at the federal level. NAFCU is committed to representing, assisting, educating and informing our member credit unions to help them grow, and help grow the credit union industry. NAFCU has close to 800 members and represents over 71% of the assets of federally chartered credit unions.

Amici, on behalf of their members, have a significant interest in ensuring that the Fair Housing Act ("FHA") is enforced in a fair and

reasonable way. According to the Eleventh Circuit, however, the category of potential FHA plaintiffs is essentially limitless, extending to individuals and entities with purely economic injuries with attenuated connections (if any at all) to any alleged act of discrimination. The novel wave of FHA litigation presently facing lenders poses significant costs without advancing the congressional goals underlying the statute.

INTRODUCTION AND SUMMARY OF ARGUMENT

In recent years the U.S. Department of Justice has vigorously pursued claims of lending discrimination under the Fair Housing Act ("FHA"). As part of settlements the Government has reached with lending institutions, funds have been made available for "allegedly aggrieved persons."[2] In securing compensation for "aggrieved persons," the Justice Department has sought to assist individuals "who obtained a loan" on allegedly improper terms.[3] No municipality has claimed a right to share in these recoveries as an "aggrieved person" based on its lost tax revenue.

Yet the City of Miami and a growing contingent of other municipalities have brought private suits premised on this exact claim, seeking

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[2] *United States v. Countrywide Fin. Corp.*, Consent Order ¶ 4, No. 2:11-cv-10540 (C.D. Cal. Dec. 28, 2011), *available at* http://tinyurl.com/CtywideOrder.

[3] *United States v. Wells Fargo Bank, N.A.*, Consent Order ¶ 17, No. 1:12-cv-01150 (D.D.C. July 12, 2012).

damages vastly greater than the Justice Department's claims. Although the FHA is concerned with protecting the victims of housing discrimination, the injuries over which these cities sue are economic: they assert standing based on the systemic *fiscal* consequences of alleged lending practices. This novel and burdensome species of FHA litigation is neither necessary nor appropriate to enforcing the statute's important anti-discrimination objectives. Absent review by this Court, this unprecedented and costly wave of litigation will continue and likely grow in strength.

1. Municipalities across the country have launched a novel campaign of FHA litigation, seeking to recover for the fiscal impacts of the financial crisis on local governments. The court of appeals' decision in this case ratifies a significant aspect of this strategy, holding that statutory standing under the FHA has no limit other than Article III of the Constitution. This expansive approach allows municipalities – and likely many others – to sue over purely economic injuries that are merely derivative of alleged discrimination against someone else.

In enacting the FHA, Congress sought to protect individuals' right to fair housing and to live in integrated communities. It demonstrated no concern with cities' interest in protecting their tax revenues as an objective of the FHA. The Eleventh Circuit, however, adopted an overbroad view of FHA standing as protecting even that derivative economic interest, based on language in opinions of this Court from the 1970s. These decisions actually stand for a more limited, and sensible, rule that individuals who

have been denied a right to live in an integrated community have standing to sue. This Court has disavowed prior statements describing the right to sue in broader terms, calling such statements "ill-considered dictum."

Allowing this novel species of FHA litigation to proceed comes at significant cost. As the cases have already begun to demonstrate, the discovery burdens will be enormous. Lenders will face extraordinary settlement pressure, well out of proportion to the actual strength of the cities' claims.

2. The 1970s decisions on which the court of appeals relied concerned individuals attempting to vindicate their right to live in an integrated community – not municipalities invoking economic interests. In finding that residents of apartment complexes where minorities were denied access had statutory standing, the Court emphasized the Federal Government's inability to fully enforce the FHA, and the need for private suits to fill that gap. At the time, the Government was limited in both its authority and resources. The Court recognized that private suits by residents of housing units were necessary to secure the congressional objective of integration, apartment complex by apartment complex.

Today, however, federal enforcement authorities have been significantly expanded. In particular, the Government is now authorized to secure monetary compensation for victims as part of a "pattern or practice" suit. In addition, the Justice Department vigorously enforces the FHA, including by investigating and pursuing the same lending practices that form the basis of the present wave of

municipal litigation. But unlike municipalities and their private counsel, the federal Executive is accountable for taking enforcement actions based solely on the public interest. Likewise, class actions may be available for aggrieved individuals, but subject to the protections of the Rule 23 class certification process. These straightforward means of enforcing the FHA underscore how anomalous it would be to give a right to sue to municipalities complaining of lost tax revenues.

ARGUMENT

I. The Court of Appeals' Decision Subjects Lenders To A Wave Of Costly Litigation With No Reasonable Limiting Principle.

Following the financial crisis, many municipalities faced shortfalls in their budgets.[4] Economists have recognized the complexities involved in tracing the impact of the financial crisis on local governments.[5] A number of cities, however, have attempted to draw a straight line connecting these economic losses to particular lending practices of individual banks. Drawing on a shared pattern of allegations and legal theories (and, in many instances, shared private counsel), these

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[4] *See* Congressional Budget Office, Fiscal Stress Faced by Local Governments (Dec. 2010), http://tinyurl.com/CBOMunBudget.

[5] *See* Kim S. Rueben & Serena Lei, Urban Institute, What the Housing Crisis Means for State and Local Governments (Oct. 2010), http://tinyurl.com/HousingCrisisLocal.

municipalities have inaugurated a new and growing species of FHA litigation.[6]

The Eleventh Circuit has ratified a significant aspect of this legal strategy. Specifically, the court of appeals held that "the definition of an 'aggrieved person' under the FHA extends as broadly as permitted under Article III." Bank of Am. Pet. App. 28a. Thus, the City of Miami was permitted to sue over lending practices directed at others, on the basis that far down the chain of causation, the city lost tax revenue and paid more for policing and other

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[6] *See County of Cook v. Wells Fargo & Co.*, 115 F Supp. 3d 909 (N.D. Ill. 2015); *County of Cook v. Bank of America Corp.*, 2015 WL 1303313 (N.D. Ill. Mar. 19, 2015); *County of Cook v. HSBC N. Am. Holdings Inc.*, 2015 WL 5768575 (N.D. Ill. Sept. 30, 2015); *Mayor and City Council of Baltimore v. Wells Fargo Bank, N.A.*, 2011 WL 1557759 (D. Md. Apr. 22, 2011); *City of Memphis v. Wells Fargo Bank, N.A.*, 2011 WL 1706756 (W.D. Tenn. May 4, 2011); *Dekalb County v. HSBC N. Am. Holdings, Inc.*, 2013 WL 7874104 (N.D. Ga. Sept. 25, 2013); *Dekalb County v. Bank of America Corp.*, No. 1:12-03640 (N.D. Ga., filed on Oct. 18, 2012); *City of Los Angeles v. Bank of America Corp.*, 2014 WL 2770083 (C.D. Cal. June 12, 2014); *City of Los Angeles v. Citigroup Inc.*, 24 F. Supp. 3d 940 (C.D. Cal. 2014); *City of Los Angeles v. Wells Fargo & Co.*, 22 F. Supp. 3d 1047 (C.D. Cal. 2014); *City of Los Angeles v. JP Morgan Chase & Co.*, No. 2:2014-cv-04168 (C.D. Cal., filed on May 30, 2014); *City of Providence v. Santander Bank, N.A.*, No. 1:14-cv-00244 (D.R.I., filed on May 29, 2014); *City of Miami Gardens v. Bank of America Corp.*, No. 1:14-22202 (S.D. Fla., filed on June 13, 2014); *City of Miami Gardens v. Wells Fargo & Co.*, No. 1:14-22203 (S.D. Fla., filed on June 13, 2014); *City of Miami Gardens v. Citigroup, Inc.*, No. 1:14-22204 (S.D. Fla., filed on June 13, 2014); *City of Miami Gardens v. JPMorgan Chase & Co.*, No. 1:14-22206 (S.D. Fla., filed on June 13, 2014); *City of Oakland v. Wells Fargo & Co.*, No. 3:15-cv-04321 (N.D. Cal., filed on Sept. 21, 2015).

services as a result of the challenged practices. The court of appeals' decision threatens to turn a wave of litigation into a torrent. Just three weeks after the Eleventh Circuit issued its decision, the City of Oakland filed its own suit, specifically noting that a federal court of appeals had approved the strategy.[7] Indeed, the theory approved by the Eleventh Circuit does not appear to be limited to municipalities. Under the Eleventh Circuit's open-ended approach to standing under the FHA, homeowners could likely sue by alleging a decrease in property value from neighboring foreclosures, business owners could sue over their lost sales, and so on.[8]

In enacting the FHA, Congress aimed to protect minorities' right to fair housing, and ensure that all Americans have access to the benefits of an integrated community. No one would suggest that protecting municipal tax bases (or neighbors' home values, or business profits) was an additional congressional objective. But the Eleventh Circuit considered itself bound to follow this unlimited view of statutory standing, pointing to language in this

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[7] *See* Press Release, City Attorney's Office, City of Oakland files federal lawsuit against Wells Fargo for damages caused by predatory lending (Sept. 22, 2015), http://tinyurl.com/OaklandLendSuit.

[8] The City of Oakland in its recent lawsuit estimated that in that city alone, "impacted homeowners could experience property devaluation of $53 billion." *City of Oakland v. Wells Fargo & Co.*, Complaint ¶ 69, No. 3:15-cv-04321 (N.D. Cal., filed on Sept. 21, 2015). Under the court of appeals' theory, every one of these homeowners could bring an FHA lawsuit based on allegedly discriminatory loans made to their neighbors.

Court's opinions from the 1970s. The actual decisions in this Court's cases do not adopt such a sweeping approach. Rather, the dictum that has led many lower courts down this path comes from a case recognizing that Congress meant to protect not just the individual who is denied housing, but also the would-be neighbor who is thereby denied her right to *integrated* housing. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208-10 (1972). The Court observed that "insofar as *tenants of the same housing unit* that is charged with discrimination are concerned," the FHA permits standing "as broadly as is permitted by Article III." *Id.* at 209 (emphasis added).

In two subsequent cases the Court repeated this "as broadly as permitted" language, without including the "tenants of the same housing unit" qualifier. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 96-97 (1979); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982). But the Court never applied this language to embrace standing based on an economic injury that is merely derivative of alleged discrimination. Moreover, in interpreting identical language in Title VII, the Court recently disavowed this broad language as not just "dictum," but "ill-considered dictum." *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 176 (2011).

The court of appeals also disregarded this Court's call for caution before extending the FHA to "novel theor[ies] of liability." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.* ("*Inclusive Communities*"), 135 S. Ct. 2507, 2512 (2015). The City of Miami and others like it have made no secret of the novelty of their legal theories.

Indeed, the City Council of Los Angeles officially described the theory as an "innovative idea" that it was pursuing on the suggestion of private counsel.[9]

The court of appeals correctly recognized the practical difficulties involved in litigating a lender's liability for an entire city's foreclosures and allocating responsibility for lost tax revenues. *See* Bank of Am. Pet. App. 19a ("It may well be difficult to prove which foreclosures resulted from discriminatory lending, how much tax revenue was actually lost as a result of the Bank's behavior, etc."). But the court offered no guidance on how those difficulties could be overcome. Instead, the Eleventh Circuit took false comfort in deferring that issue to "a subsequent stage in the litigation." *Id.* One district court is already facing the challenges at this "subsequent phase": a lender disclosed to Cook County information on more than 260,000 separate loans at just the first phase of discovery, and the county has suggested that the process continue for another year.[10] If ordinary statutory standing principles do not limit these types of suits, defendants will at a minimum face enormous costs in conducting discovery and litigating the claims.

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[9] Los Angeles City Council, Motion, File No. 11-1972 (adopted Dec. 14, 2011), *available at* http://tinyurl.com/LA11-1972 ("The Cochran Firm has approached the City with an innovative idea to pursue litigation against several large banking institutions.").

[10] *See County of Cook v. Bank of Am. Corp.*, No. 14-cv-2280, Plaintiff's Report Regarding Outstanding Discovery Disputes, at 2, 19-20 (Dkt. No. 104) (N.D. Ill., Mar. 12, 2016).

Even a lender with strong defenses will have to consider the unpredictability of outcomes under this untested theory, as individual judges around the country attempt to adjudicate the economic consequences of the financial crisis, one city at a time. In light of the hundreds of millions of dollars being sought in *each* of the many cases that have already been brought, lenders may face extraordinary settlement pressure, well out of proportion to the actual strength of the cities' claims. More broadly, the City's legal theories underlying these lawsuits may well harm the actual borrowers, as one court has already noted. *See City of Los Angeles v. Wells Fargo & Co.*, 2015 WL 4398858, at *13 (C.D. Cal. July 17, 2015) ("In the name of advocating on behalf of minority borrowers, the City decided to fight for an outcome that would hurt those same borrowers.").

II. Broad Municipal Standing Under The FHA Is Unwarranted In An Era Of Aggressive Federal Enforcement.

The question in a statutory standing case is not whether a claim can be brought at all, but who is the proper plaintiff to bring it. In recognizing a role for a particular class of plaintiffs in *Trafficante* (residents of segregated housing units), this Court emphasized that such private suits would be the "main generating force" for enforcement of the FHA. 409 U.S. at 210-11. It noted that the Department of Housing and Urban Development "ha[d] no enforcement powers," that the Justice Department "may sue only to correct 'a pattern or practice' of housing discrimination," and that even that power

was wielded by a staff of "less than two dozen lawyers." *Id.*

That diagnosis made sense at the time *Trafficante* was decided, and in the context of that decision. Congress plainly focused on promoting integrated housing, and the federal government had neither the authority nor capability to vindicate that interest apartment complex by apartment complex. Here, however, municipalities are attempting to bring the very "pattern or practice" cases that are within the ambit of the Justice Department. *See* Bank of Am. Pet. App. 41a ("The City maintains that it has alleged a *pattern and practice* of discriminatory lending by the Bank." (emphasis added)). Moreover, direct victims of such alleged patterns or practices of discrimination could potentially bring class actions, provided Rule 23 could be satisfied. Under these circumstances municipal lawsuits contribute nothing to vindicating Congress's anti-discrimination objectives, while imposing significant costs and denying defendants critical protections.

As a matter of law, the federal government's enforcement powers have significantly increased since *Trafficante*. The Fair Housing Amendments Act of 1988 provided a new enforcement role for the Department of Housing and Urban Development. Pub. L. No. 100-430, § 8, 102 Stat. 1619 (Sept. 13, 1988), 42 U.S.C. § 3612. Most significantly, the 1988 Amendments authorized the Justice Department to secure "monetary damages [for] persons aggrieved" by patterns or practices of discrimination. *Id.* § 8, 42 U.S.C. § 3614(d).

In terms of practical capabilities, moreover, the Justice Department's Housing and Civil Enforcement Section is long past the days of "less than two dozen lawyers." *Trafficante*, 409 U.S. at 211. Today the Department vigorously enforces the FHA.[11] In fact, the federal government has pursued the same lending practices over which municipalities have attempted to sue, and entered into settlements with lenders over such practices.[12] Notably, as part of these settlements the Justice Department has secured funds for "aggrieved persons" – without ever suggesting that cities could claim those funds to recover the losses to their tax revenue.[13]

There may well be grounds to question federal enforcement policies, including in light of the limitations on disparate impact liability the Court recently announced in *Inclusive Communities*. But there is no question that Congress delegated to the Attorney General – not individual municipalities –

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[11] *See* Department of Justice, Recent Accomplishments of the Housing and Civil Enforcement Section (updated March 1, 2016), http://tinyurl.com/HousingSecAccomp.

[12] *Id.*

[13] Press Release, Department of Justice, Justice Department Reaches $335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation (Dec. 21, 2011), http://tinyurl.com/DOJCtywideSettle; Press Release, Department of Justice, Justice Department Reaches Settlement with Wells Fargo Resulting in More Than $175 Million in Relief for Homeowners to Resolve Fair Lending Claims (July 12, 2012), http://tinyurl.com/DOJWFSettle; *see also* Brian Collins, DOJ, CFPB Officials Warn More 'Redlining' Cases on Way, National Mortgage News, Sept. 3, 2015, http://tinyurl.com/NMNRedlining.

the role of prosecuting alleged "patterns or practices" of housing discrimination. 42 U.S.C. § 3614(a). This delegation reflects the expertise the federal government can bring to bear on complex enforcement questions, as well as the Executive's accountability for enforcing the law in the public interest.[14] By contrast, a municipality pursuing fiscal concerns, and represented by private counsel working for a contingency fee, has no obligation to act in the public interest; instead, it has an incentive to bring whatever claims it believes can yield the largest possible settlement.

To the extent directly-affected mortgage holders are dissatisfied with the Government's enforcement of the FHA, they plainly would have standing to seek their own individual relief. And provided the Rule 23 requirements could be satisfied, a class action alleging a "pattern or practice" claim could be available. Indeed, municipal FHA cases resemble major class actions in scope and complexity, with one critical difference – the absence of the protections provided by the class certification process.[15]

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[14] *See Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985); Saikrishna Prakash, *The Chief Prosecutor*, 73 Geo. Wash. L. Rev. 521, 583 (2005) ("One reason the Founders opted for a unitary executive was to ensure that one executive would be accountable for law enforcement choices.").

[15] Notably, courts faced with private Title VII lawsuits have insisted that "pattern or practice" claims be brought only through the rubric of a class action. *See Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 967-69 (11th Cir. 2008).

In short, there is no shortage of proper plaintiffs to challenge allegedly discriminatory lending practices. The Federal Government has the power and capability to pursue "pattern or practice" actions against lenders, and to do so in a properly tailored way based on an assessment of the public interest. Likewise, individual victims of alleged discriminatory acts can, to the extent they are not made whole by Justice Department settlements, pursue relief on their own. There is no justification for inviting a flood of FHA litigation by cities across the country, and potentially other types of plaintiffs as well, to pursue separate "pattern or practice" claims based simply on their economic interests.[16]

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[16] On remand from the Eleventh Circuit, the district court in these cases recently dismissed the City of Miami's complaints without prejudice, with leave to re-plead. *Amici* understand that the City is expected to re-plead, and this litigation would therefore continue. Whatever action is taken on the new complaints, the court of appeals' decision will remain the leading authority on municipal standing under the FHA, and will likely breed continued litigation throughout the country. Immediate review by this Court remains appropriate.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted,

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